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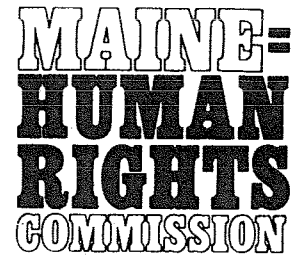
Alvin Harris Sr. (Pikesville, Md.)

v.

City of Portland (Portland)

and

Kevin Sprague (Portland)



51 STATE HOUSE STATION  
AUGUSTA, ME 04333-0051  
[www.maine.gov/mhrc](http://www.maine.gov/mhrc)

*Executive Director*  
**PATRICIA E. RYAN**

*Commission Counsel*  
**JOHN P. GAUSE**

**I. COMPLAINANT'S CHARGE:**

Complainant, Alvin Harris Sr., alleged that Respondents, City of Portland and Kevin Sprague, subjected him to less favorable terms and conditions because of his race and color while he was employed by the City of Portland.

**II. RESPONDENT'S ANSWER:**

Respondents, City of Portland and Kevin Sprague, denied the allegation of discrimination. City of Portland states that while they were aware there was strong language exchanged between Complainant and Kevin Sprague, they were not aware that the language was of a racial nature. Kevin Sprague denies discriminating against Complainant because of his race and/or color.

**III. JURISDICTIONAL DATA:**

- 1) Date(s) of alleged discrimination: July 18, 2008 through July 24, 2008.
- 2) Date complaint filed with the Maine Human Rights Commission: December 8, 2008.
- 3) Respondent, City of Portland, employs approximately 1,400 employees and is subject to the Maine Human Rights Act, Title VII of the Civil Rights Act of 1964, as well as state and federal employment regulations. Respondent, Kevin Sprague, is covered under the Maine Human Rights Act definition of "employer," which includes "any person acting in the interest of any employer, directly or indirectly," 5 M.R.S.A. § 4553(4), and the definition of "unlawful discrimination," which includes aiding and abetting another to do any type of unlawful employment discrimination. See 5 M.R.S.A. § 4553(10)(D).

- 4) Respondent is represented by Ann Freeman, Esq. Complainant represents himself.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, interviews.

**IV. DEVELOPMENT OF FACTS:**

- 1) The parties and issues in this case are as follows:
  - a) The Complainant, Alvin Harris Sr., is an African American male who worked for the City of Portland while he was an inmate at the Cumberland County Jail.
  - b) The Respondent, City of Portland (hereinafter referred to as Respondent City), partnered with the Cumberland County Jail to participate in a community services program whereby the city would utilize the inmates to assist them with clean-up and other projects throughout the city. Respondent Kevin Sprague (hereinafter referred to as Respondent Sprague) was the supervisor assigned to the crew on which Complainant worked.
  - c) Witness A is the Corrections Officer at the Cumberland County Jail to whom the complaint of racial harassment was made.
  - d) Complainant alleges that he was subjected to racial slurs and other discriminatory conduct between July 18, 2008 and July 24, 2008.
  - e) Respondent City alleged that they were told by Witness A that harsh language had been used by Mr. Sprague but had never been informed that the language was of a racial nature. Respondent Sprague denies the comments he made were racially motivated or offensive. Complainant alleges that Respondent's stated reason is false and that he was subjected to racially offensive slurs.
- 2) The parties provide the following regarding Complainant's employment with the City of Portland:
  - a) (Complainant) He was working for the City of Portland Parks and Recreation Department while he was at the pre-release center at the Cumberland County Jail. He began work on or about July 14, 2008. His supervisor on the crew was Kevin Sprague.
  - b) (Respondent City) In 2008, the City of Portland, Department of Public Services, partnered with the Cumberland County Jail to participate in a community services program whereby the city would utilize the inmates to

assist them with clean-up and other projects throughout the city. The inmates would receive additional credit towards time served. Other city departments had been participating in the program for years. The summer of 2008 was the first summer the program was implemented in Public Services.

- c) Each morning, Mr. Sprague would report to Public Services where he would receive his job assignments for the day from his supervisor, employed by Respondent City. Mr. Sprague would take the City-owned vehicle, usually a double cab truck, and drive to the jail where he would pick up his crew. The crew usually consisted of 2-5 inmates. The crew would pile into the cab and head to their first job sight of the day. As the crew finished one job, they would get in the truck and drive to the next job site for the City. That pattern continued throughout the day until the crew was dropped back off at the jail at the end of the day.
  - d) (Respondent City) Alvin Harris was not an employee of the City of Portland. He was an inmate at the Cumberland County Jail and participated in the community services program.
- 3) Complainant provides the following regarding treatment he was subjected to under the supervision of Respondent (Supervisor) Kevin Sprague:
- a) On or about July 18, 2008, Mr. Sprague told him to "shut his nigger lips" because he (Complainant) was talking and Mr. Sprague wanted to say something.
  - b) On or about July 22, 2008, he was in the crew truck with two white males (also inmates on the crew) and when they went into an area of Portland that has a high population of Somali residents, Mr. Sprague told him to get out and pick up the trash "since they were your kind of people."
  - c) On or about July 24, 2008, he was picking up trash and he was the last one to get back to the truck. Mr. Sprague made a statement such as, "always late – just like a typical nigger."
- 4) Respondent City responds to the above as follows:
- a) Kevin Sprague had been a temporary employee during the summer of 2007. The Division Director for Parks and Recreations knew that Mr. Sprague had experience working with a racially diverse group of employees in the Caribbean. Based on Mr. Sprague's experience and education, it was thought that he would be a good supervisor for inmates in the program during the summer of 2008. Mr. Sprague was employed as temporary (seasonal) crew leader for the Cumberland County Jail community service program.

- b) The crew Mr. Sprague supervised usually consisted of two to five inmates. The crew all rode in a double cab truck driven by Mr. Sprague. The crew traveled from job site to job site each day and at the end of the day, Mr. Sprague would drop the crew off at the jail.
  - c) Witness A, corrections officer at the Cumberland County Jail, informed Mr. Sprague's supervisor, employed by Respondent City, that Mr. Sprague had used strong language with one of the inmates, however, he did not provide the details of that language. Strong language, to Mr. Sprague's supervisor, did not indicate racially offensive language. The precise language that was being exchanged, including any and all racially derogatory remarks, were not shared with Mr. Sprague's supervisor or anyone else with Respondent City.
  - d) Mr. Sprague's supervisor indicated that it would be appropriate for Witness A to speak with Mr. Sprague about the incident. When Mr. Sprague's supervisor followed up with Mr. Sprague about the incident, Mr. Sprague indicated that there was a "troublemaker" on the crew and that that person had been assigned to a new crew. No further incidents were reported to anyone at the City of Portland for the remainder of the Summer.
- 5) Respondent Sprague responds to Complainant's allegations as follows:
- a) He got along fine with Mr. Harris and worked well with him. He recalls that Mr. Harris was a good worker and he enjoyed having him on the crew.
  - b) Mr. Harris talked excessively, particularly when riding to and from the jail and in between worksites. Despite repeated requests to have him refrain from talking so much, Mr. Harris continued to talk. During one such incident, on July 18, 2008, he finally, in frustration, asked Mr. Harris to "shut his negro lips up."
  - c) On July 22, 2008, Mr. Harris was instructed to get out of the truck and pick up the litter in the playground area of Kennedy Park. The amount of work at this location was best responded to by one worker. The rest of the workers emptied the trash from the back of the truck into a nearby dumpster and began break. He did make the remark "since they were your kind of people" but it was made because of his excessive talking not his race.
  - d) On July 24, Mr. Sprague did remark on Mr. Harris' tardiness because Mr. Harris was frequently late. However, Mr. Sprague never referred to him as a "typical nigger."

- e) He had previously been employed for a golf course development company in which he traveled across the U.S. and the Caribbean supervising construction crews. He supervised over 350 workers of different races including more than 80 black people and is well conversed in Spanish and Caribbean dialects. He was accustomed to using the word negro, which means black in Spanish, and was a word used frequently among the English speaking workers in the Caribbean to mean black and was not considered derogatory.
- 6) Complainant responds to the above as follows:
- a) He never used any type of strong language towards Respondent Sprague. He always showed Mr. Sprague respect and did what was asked of him even when he was humiliated by Mr. Sprague.
  - b) Mr. Sprague did use the term “nigger lips” and made the other comments as well.
- 7) Witness A provides the following:
- a) On or about July 26, 2008 two inmates, who had been working on the crew with Mr. Harris, reported to him that Mr. Harris had been called racial names by Mr. Sprague. The desk officer asked Mr. Harris if this had occurred and Mr. Harris confirmed that it had.
  - b) He and his partner interviewed Mr. Harris. Mr. Harris told him that Mr. Sprague called him a “nigger” and told him to “pick up the trash that came from your people.” The area of the city the crew was working in at that time has a high population of African Americans and people of Somali descent. Mr. Harris was obviously upset and mad.
  - c) He decided to move Mr. Harris from the Portland Parks crew and Mr. Harris went on work release shortly thereafter.
  - d) The following morning he called Mr. Sprague’s supervisor, who said he would speak to Mr. Sprague. He does not remember specifically what he told Mr. Sprague’s supervisor but he “would almost bank my bottom dollar” that he mentioned the racial comments. “I would not have just said ‘strong language’ – that could be anything.” It was a quick conversation on the phone.
  - e) The following morning he spoke to Mr. Sprague personally. Mr. Sprague said he could recall calling Mr. Harris a “negro” and that he did call him “nigger lips” in a joking manner. Mr. Sprague said all the guys on the crew were joking and laughing at the time the comment was made. Mr.

Sprague denied making any other comments of a racial nature. Mr. Sprague said he liked Mr. Harris and that he was a good worker.

- f) He reminded Mr. Sprague about the proper treatment of inmates and that comments of that nature were not to be made.
  - g) Mr. Sprague's supervisor did not ask him to speak to Mr. Sprague. He did that on his own just in case Mr. Sprague's supervisor had not spoken to him. He wanted to make it very clear that he (Mr. Sprague) would not be treating our inmates poorly or in such a manner. He thought it might mean more coming from an officer of the jail rather than just coming from his supervisor.
  - h) Mr. Harris was told of the conversation between Witness A and Mr. Sprague. Mr. Harris stated that Mr. Sprague had indeed made the racial comments to him as had been previously reported.
- 8) Respondent City provides the following regarding its complaint policies and education and training provided to employees and managers regarding harassment in the work place:
- a) There is currently no City policy or process addressing complaints made by the inmates participating in the community service program with the City.
  - b) There is a personnel policy addressing the complaint process for employees, which is outlined in Respondent City's Policy Against Harassment.
  - c) The City of Portland has New Employee Orientation for every permanent employee for the City which is a day long training that occurs approximately once per month. A portion of this training focuses on issues regarding the City's equal opportunity, discrimination and related policies. However, these issues are dealt with much more in depth at the City's day-long diversity training which is also required for all new, permanent City employees. This diversity training has been a requirement for all new, permanent City employees for the past ten years.
  - d) Additionally, each year in January, the City puts a notice on all employees' pay checks reminding them of the City's anti-discrimination and anti-harassment policies.

**V. ANALYSIS:**

- 1) The Maine Human Rights Act requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has

occurred.” 5 M.R.S.A. §4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

- 2) The Maine Human Rights Act provides, in part, as follows:

It is unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of race or color . . . discriminate with respect to the terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . .” 5 M.R.S.A. § 4572(1)(A).

- 3) Hostile Work Environment.

The Maine Human Rights Commission Regulations provide, in part, as follows:

Harassment on the basis of race or color is a violation of Section 4572 of the Maine Human Rights Act. Unwelcome comments, jokes, acts and other verbal or physical conduct of a racial nature constitute racial harassment when:

- c) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Me. Hum. Rights Comm'n Reg. § 3.09(F) (1) (July 17, 1999).

“Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive working environment.” *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57. In determining whether an actionable hostile work environment claim exists, it is necessary to view “all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.” *Id.* (citations omitted). It is not necessary that the inappropriate conduct occur more than once so long as it is severe enough to cause the workplace to become hostile or abusive. *Id.*; *Nadeau v. Rainbow Rugs*, 675 A.2d 973, 976 (Me. 1996). “The standard requires an objectively hostile or abusive environment--one that a reasonable person would find hostile or abusive--as well as the victim's subjective perception that the environment is abusive.” *Nadeau*, 675 A.2d at 976.

The MHRC Regulations provide the following standard for determining employer liability for racial harassment committed by a supervisor:

An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to racial harassment. When the supervisor's harassment culminates in a tangible employment action, such as, but not limited to, discharge, demotion, or undesirable reassignment, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor's harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

- (a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior based on race or color, and
- (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Me. Hum. Rights Comm'n Reg. § 3.09(F) (2) (July 17, 1999).

- 4) Here, Complainant, Alvin Harris, Sr., alleges that Respondents, City of Portland and Kevin Sprague, subjected him to less favorable terms and conditions of employment because of his race and color by subjecting him to racial slurs.
- 5) Respondents, City of Portland and Kevin Sprague, denied the allegation of discrimination. City of Portland states they were never made aware that comments of a racial nature were made to Complainant. The City also asserts that it was not Complainant's employer. Kevin Sprague denies discriminating against Complainant.
- 6) It is first found that Respondent City was Complainant's "employer" for purposes of the Maine Human Rights Act, with reasoning as follows:
  - (a) The Act defines "employer," in relevant part, as "any person in this State employing any number of employees, whatever the place of employment of the employees . . . ." 5 M.R.S.A. § 4553(4). "Employee" is defined simply as "an individual employed by an employer." 5 M.R.S.A. § 4553(3).
  - (b) The determination of whether Respondent City was Complainant's "employer" is fact specific and depends on whether Respondent City controlled the means and manner of the worker's work performance. *See* Equal Employment Opportunity Commission Compliance Manual, Section 2, Threshold Issues, (hereafter EEOC Compliance Manual) § 2-



III(A)(1). Inmates who participate in work release programs can be “employees” in those programs under similar definitions of employer and employee in the Maine Act. *See, e.g., Carter v. Dutchess Community College*, 735 F.2d 8, 15 (2<sup>nd</sup> Cir. 1984) (Fair Labor Standards Act). *But see* EEOC Compliance Manual § 2-III(B)(3)(a)(iii) (concluding that a prison does not have an employment relationship with its own prisoners).

- (c) Although Respondent City denies that Complainant was its employee, it acknowledges that Complainant “was ‘working’ for the City through the community service program with the county jail. . . .” Pursuant to that program, inmates assisted Respondent City with clean-up and other projects throughout the city. Although the inmates were apparently not paid in money, they would receive additional credit towards time served for their services. During their work days, the inmates were supervised by a Respondent City employee, Respondent Sprague, who transported the inmates to and from the jail in a truck owned by Respondent City. They spent their work day on Respondent City work sites before they were dropped off at the jail at the end of the day.
  - (d) It is found that Respondent City controlled the means and manner of Complainant’s work performance and was an “employee” of Respondent City for purposes of the Maine Human Rights Act.
- 7) Here, Complainant was subjected to a hostile work environment on the basis of race, with reasoning as follows:
- a) Mr. Sprague’s written testimony that he told Mr. Harris to shut his “negro lips” is not convincing for several reasons, as follows:
    - i) First, two inmates, other than Mr. Harris, reported the comments to Witness A.
    - ii) Witness A testified that Respondent Sprague admitted to him that he told Complainant to “shut his nigger lips” but that it was said in a joking manner. Since Witness A has nothing to gain by providing such testimony, his testimony is deemed credible.
    - iii) Witness A testified that Complainant was “obviously upset and mad” by Mr. Sprague’s comments when he was interviewed. Since Complainant was interviewed by Witness A at the time of these events and was “obviously upset and mad,” the allegations are found to be credible.
    - iv) Additionally, testimony provided indicated that Respondent Sprague used the term “negro,” stating he was accustomed to using that word during his work in the Caribbean where the word

“negro” means black and is not considered derogatory. It is not convincing to this investigator that Mr. Sprague used the term “negro” when telling Complainant to shut his lips. Even if Mr. Sprague did use the term “negro,” it would still be considered discriminatory to refer to Mr. Harris’ race when correcting him for talking too much. Even if persons in other cultures would not find the term derogatory, it is clear that singling out Complainant to stop talking and referring to his race, would be considered derogatory and discriminatory. One would assume that Mr. Sprague would not have told one of the Caucasian inmates to “shut your Caucasian lips.” The defense provided is simply not convincing.

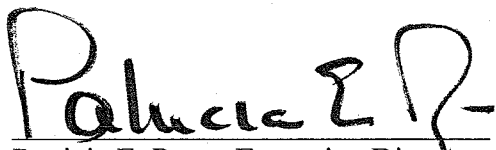
- b) Mr. Sprague’s written testimony was that when he told Mr. Harris to pick up the litter “since they were your kind of people,” he meant because of Complainant’s excessive talking – not his race. Not only is this not convincing, it doesn’t make any sense. There is no indication that African Americans or persons of Somali descent, or persons who utilized the area where they were working, talk more than Caucasians or persons of other races or anyone else. The comment was clearly made based on Mr. Harris’ race/color.
  - c) Since it is found that Mr. Sprague, in all probability, made the comment about “nigger lips” and he admits to telling Complainant to pick up the trash because they “were his kind of people” (although he denies that was racially motivated), it is not a stretch to believe that he also told Complainant that he was “always late - just like a typical nigger.” Complainant’s version is more credible.
  - d) The comments made by Mr. Sprague about Complainant’s race were highly offensive to Complainant and would be so to a reasonable person. A hostile work environment is found.
- 8) Respondent City is liable, with Respondent Sprague, for the hostile work environment, with reasoning as follows:
- a) As is reflected above, an employer is responsible for the unlawful harassment of its supervisory employees unless it can establish an affirmative defense to that liability. *See* Me. Hum. Rights Comm’n Reg. § 3.09(F)(2). The affirmative defense requires a showing both that the employer exercised reasonable care to prevent and correct promptly any harassing behavior based on race or color, and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.*


- b) Here, Respondent did not exercise reasonable care to prevent and correct the harassing behavior. Respondent did not have a complaint policy that was applicable to Complainant, and there is no indication that it provided Mr. Sprague, who was not a permanent employee, with any training in its anti-harassment policies. Moreover, once Respondent City was informed of the racial harassment, there is no indication that it took any disciplinary action against Mr. Sprague.
- c) Respondent City states that they were only told that “harsh language” was used and they were not told that the language was racially offensive. Again, this is not convincing. Witness A testified that he would not have just told Mr. Sprague’s supervisor that “strong language” had been used as that “could be anything.” He stated he “would almost bank my bottom dollar” that he mentioned the racial comments to Mr. Sprague’s supervisor. Even if, as Respondent City states, Witness A only used the words “harsh language,” it would stand to reason that Mr. Sprague’s supervisor would ask for details. Witness A’s testimony was more convincing.
- d) Further, Witness A’s testimony was convincing that he was not asked to speak to Mr. Sprague but rather he did so on his own. Witness A stated that Mr. Sprague’s supervisor said he would address the issue with Mr. Sprague. Witness A has nothing to gain by providing this testimony so it is assumed to be true and accurate.
- e) Respondent City provided a written statement indicating that when Mr. Sprague’s supervisor followed up with Mr. Sprague about the incident, Mr. Sprague indicated that there was a “troublemaker” on the crew and that that person had been assigned to a new crew. There was no information provided that Mr. Sprague’s inappropriate conduct was addressed by his supervisor or that any type of reprimand – verbal or otherwise – was issued.
- f) While Respondent’s answers state that Mr. Sprague informed his supervisor that there was a “troublemaker” on the crew who had been moved to another crew, no information was provided to indicate that Complainant was a troublemaker or that he had participated in “strong language” against Respondent Sprague. To the contrary, Respondent Sprague has stated that he enjoyed having Mr. Harris on his crew and that he was a good worker. Complainant would not be in a position, as an inmate, to be disrespectful to a supervisor or to object to that supervisor about inappropriate conduct without jeopardizing the employment that awarded him additional credit towards time served.

**VI. RECOMMENDATION:**

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that the Respondents, City of Portland and Kevin Sprague, discriminated against Complainant, Alvin Harris Sr., in the terms and conditions of his employment because of his race and color.
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. §4612(3).

  
Patricia E. Ryan, Executive Director

  
Sheila P. Pierce, Field Investigator